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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re HERBERT MORALES,

on Habeas Corpus.

B152306

(Super. Ct. Nos. KA044893 &
BA193898)

ORIGINAL PROCEEDING. Petition for writ of habeas corpus. Michael Price,
Judge. Petition granted.

Jonathan B. Steiner and Jill Ishida, under appointment by the Court of Appeal, for
Petitioner.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary E. Sanchez, and
Stephanie A. Miyoshi, Deputy Attorneys General, for Respondent.

I. INTRODUCTION

Defendant, Herbert Morales, has filed a habeas corpus petition challenging the award of presentence credits in case No. BA193898. We issued an order to show cause. In response, the Attorney General filed a return and contended that there had been an excessive award of presentence credits in a companion matter, case No. KA044893. We conclude defendant is entitled to more credits in case No. BA193898. Further, we conclude defendant's presentence credits in case No. KA044893 must be reduced.

II. DEFENDANT'S CUSTODY STATUS IN CASE NO. BA193898

Defendant was arrested on October 19, 1999, and charged with: felony evading a peace officer in violation of Vehicle Code section 2800.2, subdivision (a); two counts of felony assault on a peace officer in violation of Penal Code section 245, subdivision (c); one count of resisting an executive officer in violation of Penal Code section 69; misdemeanor driving under the influence of alcohol in violation of Vehicle Code section 23152, subdivision (a); and finally misdemeanor driving with a blood alcohol level of greater than .08 percent in violation of Vehicle Code section 23152, subdivision (b). On December 16, 1999, before then Municipal Court Judge Michael T. Sauer, defendant pled guilty to: felony evading; resisting an executive officer; and misdemeanor driving under the influence of alcohol. On January 14, 2000, defendant was sentenced to four years, two months in state prison. Proceedings were suspended and defendant was committed to the California Rehabilitation Center pursuant to Welfare and Institutions Code section 3051. Defendant was given credit for 132 days served in custody which included 44 days of conduct credits. Defendant was not received by the California Rehabilitation Center until February 23, 2000. On November 17, 2000, the court was notified that defendant was unsuitable for continued treatment by the staff at the California Rehabilitation Center. On June 21, 2001, criminal proceedings were resumed and defendant was sentenced to prison for a total of three years. He was given credit for: 177 days of actual custody; 88 days of

conduct credits; and 132 days of “backtime.” The court indicated defendant was to receive total credits of 397 days. The abstract of judgment indicates that defendant received 397 days of presentence credits which included 88 days of conduct credits. The trial court declined to award any credits for the time spent at the California Rehabilitation Center. The sentence in case No. BA193898 was ordered to run concurrently with the sentence in case No. KA044893.

III. DEFENDANT’S CUSTODY STATUS IN CASE NO. KA044893

Defendant was arrested on October 19, 1999. On January 26, 2000, defendant pled guilty to: felony violation of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)); felony driving while having 0.08 percent of alcohol in his blood (Veh. Code, § 23152, subd. (b)); and misdemeanor driving without a license. (Veh. Code, § 12500, subd. (a).) Defendant admitted that he previously had been convicted of driving under the influence of alcohol and served two prior prison terms within the meaning of Penal Code section 667.5, subdivision (b). On January 26, 2000, defendant was sentenced to five years, six months in state prison and proceedings were suspended pursuant to Welfare and Institutions Code section 3051. Defendant was explicitly advised that if he was unsuitable for treatment at the California Rehabilitation Center, he could be excluded from that institution and then be sent to prison. Defendant was given credit for 150 days spent in custody prior to the sentencing hearing which included 50 days of presentence conduct credits. Proceedings were suspended on February 9, 2000, and defendant was committed to the California Rehabilitation Center. Defendant was not received by the California Rehabilitation Center until February 23, 2000. In a letter dated November 17, 2000, the trial court was advised that defendant was unsuitable for treatment in the California Rehabilitation Center. On June 18, 2001, criminal proceedings were resumed. Defendant was allowed to withdraw his guilty plea. Defendant then reentered his guilty plea and was sentenced to three years in state prison. Defendant received credit for 909 days spent in

custody prior to the imposition of sentence on June 18, 2001, which included 264 days of conduct credits.

IV. DEFENDANT IS ENTITLED TO ADDITIONAL PRESENTENCE CREDITS IN CASE NO. BA193898

Defendant has been subject to several periods of incarceration in case No. BA193898. First, he was in custody between October 19, 1999, when he was arrested and January 14, 2000, when he was sentenced to prison, proceedings were suspended pursuant to Welfare and Institutions Code section 3051, and defendant was committed to the California Rehabilitation Center. He was not received by the California Rehabilitation Center until February 23, 2000. From October 19, 1999, until February 23, 2000, defendant was in custody for 127 days. Defendant is entitled to conduct credits pursuant to Penal Code sections 2900.5, subdivision (a) and 4019 on this 127-day time period.

Defendant's second period of incarceration was that spent subject to California Rehabilitation Center jurisdiction. From February 23, 2000, until November 17, 2000, defendant was in the custody of the California Rehabilitation Center. Defendant was excluded from the California Rehabilitation Center on November 17, 2000. This was a total of 268 days. Defendant is entitled to no conduct credits on this 268-day time period. (*People v. Eddy* (1995) 32 Cal.App.4th 1098, 1102-1110; 3 Witkin, Cal. Criminal Law (3rd ed. 2000) § 406, p. 541.) There is no merit to defendant's suggestion he was entitled to conduct credits from the September 21, 2000, date the "Unit Classification Committee" voted to exclude him. There is no evidence defendant was not receiving the treatment which constitutionally supports the denial of conduct credits to rehabilitation center patients. (*People v. Miller* (1991) 233 Cal.App.3d 1551, 1555-1557; *In re Mabie* (1984) 159 Cal.App.3d 301, 306-308.)

Defendant's third period of incarceration was that spent prior to the June 21, 2001, hearing when he was finally committed to prison. From November 17, 2000, until

sentencing on June 21, 2001, defendant spent 216 days in custody. He is entitled to conduct credits on this latter period of incarceration. (*People v. Nubla* (1999) 74 Cal.App.4th 719, 731; *People v. Guzman* (1995) 40 Cal.App.4th 691, 694-695.)

Therefore, defendant spent 343 days during the first and third periods of incarceration either in county jail awaiting sentencing or in custody after his exclusion from the California Rehabilitation Center. On this period of incarceration, defendant is entitled to 170 days of conduct credits pursuant to Penal Code sections 2900.5, subdivision (a) and 4019. Additionally, defendant is entitled to 268 days of credit while subject to California Rehabilitation Center jurisdiction. In total, defendant should have received 781 days of credit which includes 170 days of conduct credits.

The Attorney General argues that defendant is only entitled to 268 days of credit for the time spent in custody while subject to California Rehabilitation Center jurisdiction. The Attorney General reasons that defendant was first sentenced to prison in case No. KA044893 after the California Rehabilitation Center exclusion order on June 18, 2001. Further, defendant was not sentenced to prison after his exclusion from the California Rehabilitation Center in case No. BA193898 until June 21, 2001. Hence, the Attorney General argues that apart from the time spent at the California Rehabilitation Center, defendant is entitled to no presentence credits in case No. BA193898. This theory is premised on the fact that defendant was not a sentenced prisoner until June 21, 2001. It is a black letter statement of California law that if a defendant is imprisoned by another case at the time of sentencing, no presentence credits may be granted. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1180; *In re Joyner* (1989) 48 Cal.3d 487, 489; *In re Rojas* (1979) 23 Cal.3d 152, 155.) We disagree though with the theory of the Attorney General. When the procedural facts are viewed in a commonsense fashion, the sentencing proceeding which occurred first for purposes of Penal Code section 2900.5, subdivision (a), was when defendant was initially sentenced, proceedings were suspended, and defendant committed to the California Rehabilitation Center on *January 14, 2000*, in case No. BA193898. Defendant was not initially sentenced until January 26, 2000, in case No. KA044893. Both of these proceedings resulted in state prison sentences, the suspension of proceedings, and

commitments to the California Rehabilitation Center. The operative day for purposes of determining the first sentencing date in case No. BA193898 is January 14, 2000, when he was sentenced, not June 21, 2001, when defendant was sentenced after exclusion from the California Rehabilitation Center. Although the theory of the Attorney General has superficial intellectual substance, the legal reality is that the relevant date for determining when the first sentencing occurred is the day upon which defendant was initially sentenced, January 14, 2000, in case No. BA193898. *Bruner, Joyner, and Rojas* do not dictate a different result.

V. THE ATTORNEY GENERAL IS CORRECT THAT DEFENDANT'S PRESENTENCE CREDIT MUST BE ADJUSTED DOWNWARD IN CASE NO. KA044893

Although the argument of the Attorney General that defendant is entitled to fewer presentence credits in case No. BA193898 is without merit, the theory does have limited application in case No. KA044893. Defendant was initially sentenced to prison, proceedings were suspended, and he was committed to the California Rehabilitation Center in case No. BA193898 on January 14, 2000. As we have noted in our discussion of case No. BA193898, the relevant sentencing date for determining presentence credits as it relates to defendant's status as a sentenced prisoner is the initial date upon which he was sentenced, proceedings were suspended, and he was committed to the California Rehabilitation Center. As of January 14, 2000, for purposes of Penal Code section 2900.5, subdivision (a) as construed in *Bruner, Joyner, and Rojas*, defendant was a sentenced prisoner. Therefore, in case No. KA044893, defendant was entitled to no presentence credit given his status as a sentenced prisoner on January 26, 2000. Therefore, in case No. KA044893, there must be a deduction of all pre-January 26, 2000, credits. The failure to award the proper amount of credits is a jurisdictional error which may be raised at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11, 349, fn. 15; *People v. Serrato* (1973) 9 Cal.3d 753, 763-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1; *People v. Duran* (1998) 67 Cal.App.4th 267, 270;

People v. Acosta (1996) 48 Cal.App.4th 411, 415-428.) The prosecution in response to a defendant's habeas corpus petition may assert jurisdictional sentencing errors in an appellate court. (*In re Sandel* (1966) 64 Cal.2d 412, 414-419; see *People v. Serrato*, *supra*, 9 Cal.3d p. 764.) The theory underlying this rule is that the jurisdictional sentencing error may be raised at any time when brought to the attention of the court. (*People v. Acosta*, *supra*, 48 Cal.App.4th at p. 428, fn. 8; *People v. Massengale* (1970) 10 Cal.App.3d 689, 693.) There is no merit to defendant's equal protection claims premised upon the effect of *Rojas*, *Joyner*, and *Bruner*. (*People v. Davis* (1986) 187 Cal.App.3d 1250, 1256; cf. *People v. Buckhalter* (2001) 26 Cal.4th 20, 36; *People v. Ramos* (1996) 50 Cal.App.4th 810, 822; *People v. Eddy*, *supra*, 32 Cal.App.4th at pp. 1101-1110.)

When the pre-January 26, 2000, days are eliminated from the presentence credit calculus, the following are the relevant dates. From January 26, 2000, until his arrival at the California Rehabilitation Center on February 23, 2001, defendant is entitled to 29 days of credit for time actually served as well as Penal Code section 4019 credits. From February 23, 2000, until his November 17, 2001, exclusion from the California Rehabilitation Center, defendant is entitled to 268 days of credit for time served but no conduct credits. Finally, defendant is entitled to credit for time actually served of 214 days between the November 17, 2001, exclusion from the California Rehabilitation Center and June 18, 2001, sentencing date. The total number of non-California Rehabilitation Center custody credits is 243 days plus 120 days of Penal Code section 4019 credit which is added to the 268 days he spent as an in-patient. Thus, defendant is entitled to total credits in case No. KA044893 of 631 days, which includes 120 days of conduct credit.

VI. DISPOSITION

The petition for writ of habeas corpus is granted in part. In case No. BA193898, the computation of presentence credits of June 21, 2001, is vacated. In case No. BA193898, defendant is to receive 781 days of presentence credit which includes 170 days of conduct credits. In case No. KA044893, the presentence credit award of June 18, 2001, is vacated.

In case No. KA044893, defendant is to receive presentence credits of 631 days which includes 120 days of conduct credits. Within 10 days of filing date of this order, the Clerk of Los Angeles Superior Court is to prepare amended abstracts of judgment and forward them to the Department of Corrections. This order is final forthwith pursuant to rule 28(d) of the California Rules of Court.

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TURNER, P.J.

MOSK, J.

I concur. I do so as to the issue in KA044893 only because I cannot say that *In re Joyner* (1989) 48 Cal.3d 487 would not be applied by the Supreme Court to this case. In that case, the court recognized that its decision would “likely . . . produce some incongruous results and arguable unfairness. . . .” (*Id.* at p. 495.) The court seems to suggest that it is setting forth a “readily understood rule” for cases involving presentence credits for concurrent terms imposed in multiple proceedings because that rule “produces fair and reasonable results in a majority of cases.” (*Ibid.*) Notwithstanding the court’s language that with respect to “a number of troubling questions,” “[w]e do not expect that this decision will resolve them all . . .” (*ibid.*), it implies that its decision will have to be applied even in the minority of cases in which the result will not be fair and reasonable.

This is one of those minority of cases. As the dissent said in *In re Joyner, supra*, 48 Cal.3d at p. 500, the result here will be that the defendant who cannot afford to post bail in both cases will, in effect, serve more time in custody than one who could afford bail in two concurrent cases. The purpose of presentence credits is to equalize the time served by one who can afford bail and by one who cannot. Nevertheless, because I perceive that the result here is supported by the present state of the law, I concur.

MOSK, J.

J. Grignon, Dissenting.

Defendant was arrested in two separate cases on October 19, 1999. He was initially sentenced in case No. BA193898 on January 14, 2000, and in case No. KA044893 on January 26, 2000. In both cases state prison sentences were imposed (four years two months and five years six months); proceedings were suspended; defendant was committed to the California Rehabilitation Center (CRC). Defendant arrived at CRC on February 23, 2000. On November 17, 2000, defendant was excluded from CRC. He was returned to the superior court. In both cases, the initial sentences were vacated on motion of the prosecution and defendant was resentenced. He received shorter state prison sentences (three years on each case). He was resentenced in case No. KA044893 on June 18, 2001, and in case No. BA193898 on June 21, 2001. The sentences were concurrent.

The question presented in this writ proceeding is the amount of presentence credit to which defendant is entitled on each case. The majority selects the initial sentence dates in January 2000 as the dates upon which defendant became a sentenced prisoner and awards him credit on each case for the time spent in custody from January 26, 2000. Under the majority's theory, defendant is entitled to dual credits from January 26, 2000, because from that date he was a sentenced prisoner on both cases. Inexplicably, the majority awards defendant presentence conduct credit for the period between his exclusion from CRC in November 2000 and his resentencing in June 2001. In my view, defendant was either (1) a sentenced prisoner from January 2000, in which case he is of course not entitled to presentence conduct credit after that date; or (2) defendant was not a sentenced prisoner until June 2001, in which case he is entitled to presentence conduct credit, but on only one of the cases. Although the issue is not without doubt, I would conclude defendant's initial sentences were vacated and defendant was sentenced in June 2001. Accordingly, he is entitled to actual, and presentence conduct credit (exclusive of the period in CRC), from the date of his arrest until June 18, 2001, in case No. KA044893, and no presentence credit in case No. BA193898.

In order to understand the issues involved in this case, it is necessary to set forth a number of unrelated sentencing principles. First, where a defendant is sentenced to state prison, criminal proceedings are suspended, the defendant is committed to CRC, the defendant is excluded from CRC, criminal proceedings are reinstated, and the suspended state prison term is executed, the defendant is not entitled to conduct credit under Penal Code sections 2931 and 2933 for the period of the CRC commitment. (*People v. Eddy* (1995) 32 Cal.App.4th 1098, 1101-1102.) Nor is a defendant entitled to presentence conduct credit under Penal Code section 4019 for time spent at CRC. (*People v. Guzman* (1995) 40 Cal.App.4th 691, 694.) A defendant is, however, entitled to presentence conduct credit for the time spent in custody between exclusion from CRC and resentencing. (*Id.* at pp. 694-695.) Second, the sentence imposed prior to commitment to CRC is “in the nature of an interim sentence that [may] be modified when the defendant [is] returned from CRC to the sentencing court.” (*People v. Nubla* (1999) 74 Cal.App.4th 719, 725.) “[A]n involuntary termination [from CRC is] a discharge from commitment which then empowers the court to enter a sentence appropriate to the circumstances.” (*Id.* at p. 726.) “[T]he sentencing court retains jurisdiction over the defendant during the period when the defendant is committed to CRC.” (*Id.* at p. 728.) After an involuntary termination from CRC, “the defendant [is to] be returned to the court in which the case originated ‘for such further proceedings on the criminal charges as that court may deem warranted,’ and . . . the ‘court shall then promptly set for hearing the matter of the resentencing of the defendant upon the conviction which subsequently resulted in the original civil commitment.’” (*Ibid.*) Finally, presentence “refers to the time the defendant was originally sentenced and placed in the custody of the Director [of the Department of Corrections] to commence service of his term” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 33.) A defendant is serving a term of imprisonment once sentenced, committed to state prison and delivered to the Director of the Department of Corrections. (*Ibid.*)

Here, I would conclude that the sentences imposed by the trial courts in January 2000 were merely interim sentences. The trial courts still retained jurisdiction over defendant. Defendant was not committed to state prison, nor was he delivered to the

custody of the Director of the Department of Corrections. The sentences imposed in January 2000 were completely vacated. New and substantially shorter sentences were imposed in June 2001. It was only thereafter that defendant was committed to the custody of the Director of the Department of Corrections to commence service of the terms of imprisonment. Defendant was not a sentenced prisoner until June 18, 2001. Thus, when defendant was sentenced in case No. BA193898 on June 21, 2001, he was entitled to no presentence credit of any kind, because he was a sentenced prisoner in case No. KA044893 and all presentence credit was attributable to that sentence. (*People v. Bruner* (1995) 9 Cal.4th 1178, 1180-1181; *In re Joyner* (1989) 48 Cal.3d 487, 489; *In re Rojas* (1979) 23 Cal.3d 152, 155.) Defendant was entitled to presentence credit in case No. KA044893 from the date of his arrest on October 19, 1999, to the date of his sentencing on June 18, 2001. Defendant was also entitled to presentence conduct credit under Penal Code section 4019 for that period, except for the period during which he was committed to CRC.

In any event, even if I were to conclude that defendant was sentenced on both cases in January 2000, and serving a term of imprisonment, I could not conclude that defendant was entitled to presentence conduct credit for any period thereafter. (*People v. Buckhalter, supra*, 26 Cal.4th at p. 33.) Defendant was either a sentenced prisoner or he was not.

I would modify the presentence credit on both cases to reflect the views expressed in this dissenting opinion.

GRIGNON, J.